United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-5015

To Be Argued By:
AARON GELBWARKS, ESQ.

United States Court of Appeals

FOR THE SECOND CIRCUIT

In the Matter of

ROBERT K. GOLDEN, Bankrupt,

ROBERT K. GOLDEN,

Plaintiff-Appellant,

against

RENEE GOL[illegible]

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF DEFENDANT-APPELLEE

GELBWARKS & POLLACK
Attorneys for Defendant-Appellee,
299 Broadway
New York, N. Y. 10007
(212) 732-2540

TABLE OF CONTENTS

CITATION OF DECISIONS, STATUTES OR RULES CITED IN APPELLEE's BRIEF

CITATIONS CONTINUED

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-5015

In the Matter of

ROBERT K. GOLDEN, Bankrupt

ROBERT K. GOLDEN,

Plaintiff-
Appellant

- against -

RENEE GOLDEN,

Defendant-
Appellee.

On Appeal from the United States District Court
for the Southern District of New York

STATEMENT OF CASE

The within appeal is from an Opinion-Order of Hon. Edward Weinfeld, U. S. D. J. entered on February 26, 1976, whereby an Order of the Bankruptcy Court dismissing Appellant's complaint was affirmed.

Robert K. Golden, the bankrupt herein, brought on a complaint wherein he sought a judgment of the Bankruptcy Court declaring certain portions of an order and judgment of the Family Court of the State of New York to be dischargeable. The order of the Family Court awarded the bankrupt's ex-wife, Renee Golden, the aggregate sum of $35,086.00 comprised of arrears of support of $21,560.00 and $13,526.00 of arrears of child support; and additionally awarded Mrs. Golden's attorneys, Lotwin, Goldman, Rosen & Greene, Esqs., counsel fees and disbursements of $5,169.12.

At the trial before the Bankruptcy Court an agreement between the bankrupt and his ex-wife dated March 1, 1968 (Appendix p. 16a) and the judgment of the Family Court dated December 17, 1974 (Appendix p. 33a) were introduced into evidence.

The Bankruptcy Judge found that the judgment of the Family Court for alimony and support is not a debt dischargeable in bankruptcy and dismissed the bankrupt's complaint.

On appeal before the District Court, the order of the Bankruptcy Judge was affirmed in all respects by Judge Edward Weinfeld.

STATEMENT OF FACTS

The bankrupt, Robert K. Golden, seeks in the within proceeding to discharge a portion of an Order and Judgment of the Family Court of the State of New York (Appendix p. 33a) dated December 17, 1974, awarding bankrupt's ex-wife the aggregate sum of $35,086.00, comprised of arrears of support of $21,560.00 and $13,526.00 of arrears of child support and counsel fees and disbursements of $5,169.12.

The bankrupt contends that a portion of this Order and Judgment of the Family Court is a penalty, by reason of the fact that a prior agreement between the parties contained provisions that in the event of a default by the bankrupt, he shall be required to pay $5.00 for each day of said default in payment of Mrs. Golden and further reviving the right of Mrs. Golden to receive alimony payments of $35.00 per week.

POINT I.

THE FAMILY COURT JUDGMENT HEREIN IS NOT DISCHARGEABLE IN BANKRUPTCY.

The Family Court judgment herein (Appendix p. 33a) entered December 17, 1974, was for alimony and child support and is not dischargeable under the Bankruptcy Laws. See: Audubon v Shufeldt, 1901, 181 U.S. 575, 21 S.Ct. 735, 45 L.Ed. 10009.

The merger of a claim in a judgment does not change its nature insofar as provability in bankruptcy is concerned; the Court in Bankruptcy may look behind the judgment to the essence of the liability. See: Pepper v Litton, 308 U.S. 295, 305. In the instant case, we have a Family Court judgment for alimony and child support, which amounts were computed by reference to the formula agreed to by the parties in a previous written agreement (Appendix p. 16a) in which both parties were represented by counsel. The Family Court merely carried out the agreement of the parties as previously provided in their written agreement, with respect to future alimony and child support inthe event of defaults in payments by the bankrupt. All payments previously made by the bankrupt to Mrs. Golden were for the support and maintenance of Mrs. Golden and the infant son of the parties. The Family Court order in no way changes the reason, purpose or rationale for the payments made and to be made to Mrs. Golden, to wit, for the support and maintenance of herself and the son of the parties. Characterizing the increased payments as a "penalty" in no way changes the character or purpose of the payments.

POINT II.

IS THE WITHIN JUDGMENT OF THE HON. STANLEY GARTENSTEIN AGAINST THE BANKRUPT A JUDGMENT FOR ALIMONY, SUPPORT AND MAINTENANCE, OR IS IT A "PROPERTY SETTLEMENT ORDER"?
(Appendix p. 33a)

I would answer this question by referring directly to page 3 of the Order of December 17, 1974, of the Hon. Stanley Gartenstein (Appendix p. 33a) which states:

> "ORDERED and ADJUDGED, that arrears of support due the Petitioner and the parties' infant son by the Respondent are hereby fixed in the aggregate sum of Thirty-Five Thousand Eighty-Six ($35,086.) Dollars, of which amount Twenty-One Thousand Five Hundred Sixty ($21,560.) Dollars represents arrears of support due Petitioner and Thirteen Thousand Five Hundred Twenty-Six ($13,526.) Dollars represents arrears of support due the parties' infant son; ***"

The clear, unambiguous and direct language of Judge Gartenstein states that the $35,086.00 awarded in that judgment consists of $21,560.00 of arrears of support due Petitioner (Mrs. Golden) and $13,526.00 as arrears of support due the parties' infant son. I cannot conceive of any clearer statement of what is involved in this judgment than the actual language of the Judge who decided this case and signed the Order.

This case represents an attempt by the bankrupt to characterize the final Order herein as a "property settlement" rather than support

and maintenance for his ex-wife and infant son. None of the cases cited in the bankrupt's brief (Appendix p. 19) is applicable, as said cases clearly involve property settlements as distinguished from maintenance and support.

Hylek v Hylek, 53 F.Supp. 657, affirmed 148 F.2d 300, involved a judgment in favor of divorced wife for unpaid installments for maintenance and child support. These claims were not discharged in spite of the fact that children were emancipated at time judgment was obtained.

In Re Avery, 114 F. 2d 768, involved a Michigan divorce decree wherein the Court found that the part which constituted a release of dower and property rights was subject to discharge in bankruptcy.

Tropp v Tropp, 129 Cal. App. 162, 18 Pac. 2d 385, involved a judgment on notes issued pursuant to a property settlement, and clearly set aside $50,000.00 as the property settlement which was a debt discharged in bankruptcy.

Fife v Fife, 1 Utah 2d 281, 265 Pac. 2d 642, involved certain debts against jointly owned property of the parties and clearly not applicable in the instant situation.

A careful reading of the amended Separation Agreement of the bankrupt and Mrs. Golden, dated March 1, 1968 (Appendix p. 16a), and the judgment of Judge Stanley Gartenstein (Appendix p. 33a), fail to show any discussion, reference or statement referring to an

adjustment of "property" rights. I fail to see how a judgment for support and alimony arrears can in any way be compared with an adjustment of property rights in the cases cited in the bankrupt's brief.

The Bankruptcy Judge, in his decision herein (Appendix p. 47a) stated and summarized as follows:

> "The debt evidenced by the judgment is for alimony and support under the separation agreements. Here, as in cases with similar fact patterns, the separation agreement is adequate consideration supporting a promise to pay support and maintenance of wife and child and does not create an independent debt which might be dischargeable in bankruptcy. In re Ridder, 79 F. 2d 524 (2d Cir. 1935), cert. denied 297 U.S. 721 (1936). The bankrupt's contention that the obligation to pay underlying the judgment is based on a simple dischargeable debt is without merit.
>
> The bankrupt insists that the debt of $9,060. representing revived alimony at $35. per week and $8,960. representing the $5. per day penalty, or a total of $18,020. whatever it may represent, does not constitute support. He grounds this contention on the fact that provision was made for support and maintenance in the second separation agreement and that the debts represented here are not for support and maintenance, since they only arose when the bankrupt should default on payments which were indeed for support and maintenance. He further contends that the obligation to pay these additional sums is imposed as an incentive to the bankrupt not to default, is in addition to this obligation for past due and prospective support in the nature of liquidated damages and therefore is clearly not for support within the intent of Section 17a(7).

(Appendix p.48a) Whether a debt is for support and maintenance depends on its essential nature, rather than upon the form

in which it is garbed. Krupp v Felter, 77 N.Y. Supp. 2d 665 (S.C.Y.Y. - 1948), affirmed 80 N.Y.S. 2d 892 (App. Div. 1948). The computation of arrears incorporated in the Family Court judgment refers to these debts as 'support' even though they arise only on the bankrupt's default. At first blush, without considering the totality of the facts surrounding the separation agreements it might appear that the debt here in question is not for support. However, at second blush, it becomes clear that both the revived alimony and the $5. per day late charge are in the nature of support. In the original separation agreement the wife was to receive $35. per week alimony. In the current agreement the wife waived this alimony provision in future so long as the bankrupt kept current on his payment of arrears. The bankrupt, on his part, agreed that in the event he defaulted in any of the payments outlined in the new agreement, his obligation to pay alimony was revived. Certainly the obligation to pay alimony is in the nature of support to which the wife is entitled. It is abundantly clear that the wife did not entirely relinquish this right to alimony. She merely agreed that in the event the bankrupt kept his payments current she would not insist on these additional payments. In re Ridder, supra.

(Appendix p.49a) In dealing with the provision of the separation agreement which relates to the $5. per day late charge, it is possible to read this part of the judgment as being in the nature of a penalty for the bankrupt's failure to perform his obligation under the agreement. If this were the case, such position is of no help to the bankrupt for it is generally accepted that a liability for penalties is not dischargeable in bankruptcy. In re Abramson, supra; cited with approval in Custom Wood Products, Inc. v United States, 338 F. Supp. 337 (W.D. Mich. 1971). It is particularly so here, where the 'penalty' is directly related to the alimony and support which are themselves nondischargeable debts."

A reading of the Separation Agreement of the parties dated March 1, 1968 (Appendix p. 16a), and the Family Court judgment of

the Hon. Stanley Gartenstein (Appendix p. 33a), impose the conclusion that the judgment in this matter is solely one for support, maintenance and alimony payments intended solely for the support and maintenance of the ex-wife of the bankrupt and the infant son of the bankrupt. This Court should not exercise its broad discretionary review powers in favor or overturning the clear judgment and mandate of the Family Court of the State of New York, which was rendered after a long and protracted trial of the factural issues.

The bankrupt's wife sued for support payments for herself and son, and that is exactly what the Family Court granted to her.

POINT III.

DOES THE WITHIN JUDGMENT OF THE FAMILY COURT OF THE STATE OF NEW YORK (Appendix p. 33a) PROVIDE FOR A PENALTY?

The judgment of the Hon. Stanley A. Gartenstein of the Family Court of the State of New York (Appendix p. 33a) does not provide for any penalty, as the Family Court would only provide for support and maintenance by way of a judgment. The customary "penalty" of the Family Court is to provide for incarceration of a parent delinquent in obeying the mandates of the Court.

In the instant case, the Alabama decree (Appendix p. 16a) clearly provided for alimony, and the subsequent Family Court orders, both of the Hon. Juvenal Marchisio (Appendix p. 34a) and the order of Hon. Stanley Gartenstein (Appendix p. 33a), both provided for alimony, support and maintenance of the bankrupt's ex-wife and infant son. Further, while this Court has ample power and authority to inquire into the basis of the jurisdiction of another Court, I do not believe that this power should be undertaken at ever instance where it is sought by a bankrupt, but this function should be best left to the state courts of the state wherein the bankrupt resides. It is evident from the case law of the State of New York, that the Family Court has adequate statutory authority and jurisdiction to impose alimony, support and child maintenance payments based upon either

out-of-state divorce decrees and/or separation agreements between adult consenting parties, which agreements are reduced to writing, and adequately tested in an adversary law proceeding to which both parties submit themselves in the Family Court of the State of New York. See: McKinney's Consolidated Laws, Volume 29A, Part I Family Court Act. §466(c)

This case does not demonstrate the imposition of a penalty as the Court clearly enforced the contractual rights of one party as against another party within the framework of the Family Court Act, supra.

While a "penalty" is designed to punish, the contractual provisions of the Separation Agreement of the parties (Appendix p. 16a) were designed to compensate the ex-wife for financial deprivation which would be created by bankrupt's failure to make timely support and maintenance payments as specified in the Agreement.

The District Court adequately considered this point and wisely decided not to disturb the findings of the Family Court as embodied in the Family Court judgment. Judge Weinfeld, in his opinion and order (Appendix p. 63a) stated as follows:

> "The debts are for 'alimony ... maintenance or support' and it does not matter whether they are described as

'revived alimony', 'incentives' or 'penalties'. While this Court has the power to look behind the Family Court judgment and examine the nature of the underlying debt to determine dischargeability, (6) it cannot ignore the agreement of the parties themselves and adopted by the Court that the so-called 'penalty' provisions were an interlaced part of the petitioner's marital obligation. Moreover, the agreement's incorporation in the 1968 decree of the Family Court, with the specific direction for its compliance, necessarily carried with it the judicial determination that the contract as a whole 'constitute[d] such suitable provision for wife and chi[d] 'as justice requires . . . .'" (7) In sum, upon this record the Court concludes that the debts at issue were incurred for '"alimony . . . maintenance or support," and are non-dischargeable.(8)

The order of the Bankruptcy Judge is affirmed in all respects."

---

(6) Wetmore v Markoe, 196 U.S. 68, 72 (1904), Cf. Pepper v. Litton, 308 U.S. 295 (1939).

(7) Goldman v. Goldman, 282 N.Y. 296, 302 (1940).

(8) Petitioner's suggestion that the Family Court was without jurisdiction to award the judgment at issue here is without merit. In granting the judgment the Family Court was not entering a new support order but enforcing the terms of its previous decree. The judgment was based on currently effective support or alimony provisions. See Silver v. Silver, 36 N.Y. 2d 324, 367 N.Y.S. 2d 777 (1975).

POINT IV.

A FINE OR PENALTY LEVIED BY A STATE COURT IS NOT DISCHARGEABLE IN BANKRUPTCY.

Even if it could be found that the order of the Family Court of the State of New York included a fine or penalty, such fine or penalty is not dischargeable in bankruptcy, even where the fine or penalty is turned over to a party by the Court. See: In re Dearborn Mfg. Corporation (D.C.) 18 F. Supp. 763; In re Green, (W.D.N.Y.) 6 F. Supp. 1022; In re Thomashefsky (C.C.A.) 51 F. 2d 1040; In re Spagat (D.C.) 4 F. Supp. 926. The Supreme Court of the United States has so held since the 1846 case of Spalding v New York, 4 How. 21, 11 L.Ed. 858, 45 U.S. 21. See also People v Spalding, (N.Y. 1843) 10 Paige, 284.

The Courts of New York State have similarly held that a penalty imposed by a State Court is not dischargeable in bankruptcy. See: Rosevine Realty Corporation v Stich, 164 Misc. 339, 298 N.Y.S. 758, 760; New Amsterdam Casualty Co. v McMahon, 196 Misc. 746, 93 N.Y.S. 2d 32,33.

It is thus readily apparent that if the payments ordered by the Family Court are deemed a "penalty" they are not provable or dischargeable in bankruptcy.

C O N C L U S I O N

The application of the bankrupt in the instant matter must be denied in all respects, as an award for alimony, maintenance and child support is not dischargeable in bankruptcy. Alternatively, if it could be found that any portion of the Family Court judgment is a "penalty" that would also not be dischargeable in bankruptcy.

Respectfully submitted,

GELBWAKS and POLLACK
Attorneys for Renee Golden

On the brief:
Aaron Gelbwaks